

STATE OF SOUTH CAROLINA)	BEFORE THE ADMINISTRATOR
)	SOUTH CAROLINA DEPARTMENT
COUNTY OF RICHLAND)	OF CONSUMER AFFAIRS
SOUTH CAROLINA DEPARTMENT OF)	
CONSUMER AFFAIRS,)	
)	
PETITIONER,)	DOCKET NO. 0229
)	
vs.)	ORDER
)	
RUFUS RIVERS, INDIVIDUALLY;)	
AND dba TRICOUNTY MORTGAGE)	
SERVICES,)	
)	
RESPONDENTS.)	
_____)	

STATEMENT OF THE CASE

This matter came before me via the Staff's service of Notice of Hearing and Petition by mail on or about August 5, 2002. The Petition alleges the Respondents Tricounty Mortgage Services ("Tricounty"), a sole proprietorship licensed mortgage loan broker, and Respondent Rivers, the one hundred percent owner of Tricounty, engaged in two different acts violative of the Mortgage Loan Broker Act, *S. C. Code Ann.* §§ 40-58-10 through -110 (Supp. 2001), or the Loan Broker Act, *S.C. Code Ann.* §§ 34-31-10 through -90 (Supp. 2001). Specifically, Staff alleges that in connection with an application for a loan by Alicia and John Grant, Respondents took \$8000.00 for a purported downpayment on a home loan. Staff also alleged that Investigator Martha Guinyard attempted to do a compliance review at Respondents' business location on or about June 19, 2002 and did not find it open and staffed during regular business hours. According to the Staff, these violations of the Respondents have called into question whether they maintain the requisite financial responsibility, experience, character, and

general fitness to command the confidence of the community and to warrant the believe the business may be operated honestly, fairly, and efficiently, according to the purposes of the Act, pursuant to *S. C. Code Ann.* § 40-58-60 (A).

Staff seeks, alternatively and in aggregation, relief in the form of a cease and desist order requiring the cessation of violations of the Mortgage Loan Broker Act; a finding that the Respondents have engaged intentionally or repeatedly in a course of conduct in violation of the Mortgage Loan Broker Act; the permanent or temporary revocation of Respondent Tricounty's license and Respondent Rivers' certification to work as a broker employee and/or owner; a fine for each offense; an increase in Tricounty's bond to \$25,000.00, and a refund of \$8000.00 to the Grants.

FINDINGS OF FACT

1.) Respondents were served with the Notice of Hearing and Petition in this matter on or about August 5, 2002 (Exhibit 1).

2.) Respondents are engaged in the Mortgage Loan Broker business (Testimony of Grant and Shuler; Exhibit 6).

3.) In late March of 2002, Alicia and John Grant approached Respondents in order to get a loan to purchase a home (Testimony of Grant).

4.) Respondent Rivers sought from and received from the Grants a series of payments totaling seven thousand (\$7000.00) dollars. He indicated to the Grants that these moneys for a down payment for the home and the money had to be "seasoned" or "sourced" (Testimony of Grant and Rivers; Exhibits 2 and 7).

5.) While the evidence of record conflicts on who was to blame for the delays, in

fact the Respondents never arranged a loan for the Grants, but the Grants nevertheless did not receive a refund of their seven thousand (\$7,000.00) dollars as of the time of the hearing (Testimony of Grant and Rivers).

6.) Without necessarily deciding between competing versions of the facts, it is worthwhile to summarize briefly the testimony of Mr. Grant and Mr. Rivers. Mr. Grant testified to interminable delays and unresponsiveness resulting in his complaint. He stated that he put in a call to the lender the loan was ostensibly being arranged with and learned the lender had no record of an application from him. I do not put reliance in this statement as it is based on hearsay. Ultimately, according to Mr. Grant, the seller tired of the inaction of Tricounty and sold the property to another purchaser, apparently treating the earnest money as forfeited when the agreed lock in expired. I do find credible, however, that once he withdrew his application on June 3, 2002, he went to another broker and his loan and house purchase was accomplished quickly (Testimony of Grant; Exhibits 4 and 7).

Mr. Rivers for his part insists that he was ready and able to go forward with the transaction. He sent a prequalification memorandum on March 26, 2001 (apparent misprint of the year). He offered into evidence a copy of a conditional acceptance of Mr. Grant by Finance America dated April 1, 2002 (Exhibit 9). He testified that the later delays were due to Mr. Grant's requests for minor changes in the terms. In his response to the Grant's complaint, he wrote that Mr. Grant was told to tell him that the house had been sold, implying this was not the case, but never testified or otherwise responded to show where he got this information (Exhibit 6). Respondent Rivers also took the rather bizarre position in responding to the complaint that though the complaint was made out as from both Alicia and John Grant, it was signed by Mrs.

Grant only, and therefore no complaint was filed by his customer, whom he construed to be Mr. Grant, such that the complaint should be dismissed (Exhibit 7). I find that Mr. Grant fully intended to pursue the complaint jointly with his wife (Testimony of Grant). Mr. Rivers further testified that he had never told the Grants that they were not going to receive a refund, and he fully intended to refund their money. He said that the reason he ultimately had not arranged their refund was that they had filed a summons and complaint against him in magistrates' court and later filed a breach of trust criminal complaint against him, and his failure to refund their money was due in part to his uncertainty of his legal position (Testimony of Rivers).

7.) On June 19, 2002, Department Investigator Martha Guinyard visited Tricounty's location at 416A Old Trolley Road in Summerville, S.C., in conformance with filings Tricounty had made with the Department indicating its office hours were from 9:00 A.M. to 5:00 P.M.. She went to the business promptly at 9:00 A.M. and stayed until 9:30 A.M. trying to position her vehicle so as to be able to notice the possibility someone might enter through a back entrance. She knocked on the door again at 9:30 A.M., and there was no answer (Testimony of Guinyard; Exhibit 5).

CONCLUSIONS OF LAW

1.) I, as Administrator of the Department of Consumer Affairs, have personal and subject matter jurisdiction to hear and determine this matter pursuant to the Mortgage Loan Broker Act, *S. C. Code Ann.* §§ 40-58-10 through -110, the Administrative Procedures Act, *S. C. Code Ann.* §§ 1-23-310 *et seq.*, and the Loan Brokers Act, *S. C. Code Ann.* §§ 34-31-10 through -90 (Supp. 2001).

2.) The Respondents were served properly and timely under the Administrative

Procedures Act, *S. C. Code Ann.* §§ 1-23-310 *et seq.* (Supp. 2001).

3.) I find the Respondents failure or refusal to refund the Grants their money (to the day this Order is signed) to violate the Mortgage Loan Broker Act in at least the following particulars:

a.) *S. C. Code Ann.* § 40-58-70 (1), by misrepresenting material facts or making false promises likely to influence, persuade, or induce an application for a mortgage loan, or a mortgagor to take a mortgage loan;

b.) *S. C. Code Ann.* § 40-58-70 (2), by intentionally misrepresenting or concealing a material factor, term or condition of a transaction to which they are a party, pertinent to an application for a mortgage loan or a mortgagor;

c.) *S. C. Code Ann.* § 40-58-70 (3), by engaging in a transaction, practice, or course of business which is unconscionable in light of the regular practices of a mortgage loan broker, or which operates as a fraud upon a person in connection with the making of or purchase or sale of a mortgage loan;

d.) *S. C. Code Ann.* § 40-58-70 (4) by Respondents failing to use due diligence and make reasonable efforts to procure a loan for the Grants;

e.) *S. C. Code Ann.* § 40-58-70 (5) by collecting fees in a mortgage loan broker transaction in addition to and in excess of the bona fide third party fees allowed by that section or any additional fees specifically authorized by the Department; and

f.) *S. C. Code Ann.* § 34-36-20 (1) by collecting advance fees in a loan broker transaction. Specifically, I find that inasmuch as Respondents have violated Section 40-58-70 (5), their activities fall outside of the scope of their certificate of registration and thereby outside of

the scope of the protective exemption from the definition of “loan broker” in Section 34-36-10.

I make these findings fully aware of Respondent River’s testimony as to the reasons for the delays. It was simply not adequately explained how the availability of a loan could not be finally determined between the end of March and June 3, 2002. It was not adequately explained why the money could not be accounted for to this day. Whether or not the money had to be “sourced” or “seasoned” no adequate explanation was given concerning why the money needed to be in Respondent Rivers’ hands rather than Mr. Grant’s own account. If any potential lender needed to know the “source” of the funds, whether a gift of a family member, income or otherwise, the ultimate source would remain the same, through Mr. Grant, unless someone sought to mislead the lender. If the issue was to have the money in one place for a time so that the lender might regard the funds as stable or safe, I can imagine no scenario in which a responsible lender would not consider money sitting in Mr. Grant’s account to be more stable or more likely to be a bona fide asset than money that at some point has to be transferred from the broker’s account. I am aware of Respondent Rivers’ assertion that Mr. Grant did not have a bank account. I do not find credible the notion that an account could not have been set up in Mr. Grant’s name in the amount of \$7000.00 or more. Respondent Rivers told Mr. Grant the money was in an escrow account (see also Exhibit 6), yet he testified that it had been transferred to his accountant’s account (Testimony of Rivers). It is noteworthy that the term “escrow account” itself implies a fiduciary relationship, and an obligation on the part of the one who controls the escrow account not to deal with the escrow in any way other than required by law or specific agreement. Nevertheless, according to Respondent Rivers, the funds were transferred to a third party for reasons not made clear. It is not possible to conclude with certainty whether Respondent Rivers

has commingled the Grant's money with his own, but the failure to refund money to the Grants even as the Staff prepared to move against his license suggests it is likely the funds have been commingled.

4.) I find that Respondents failure or refusal to have their location open and staffed during published office hours on June 19, 2002 to be a violation of *S. C. Code Ann.* § 40-58-65 (B).

5.) I find that the above violations were engaged in intentionally and repeatedly in a course of conduct in violation of the Mortgage Loan Broker Act. The collection of unauthorized money was accomplished with no less than five payments between April 2, 2002 and May 6, 2002 (Exhibit 2). Whether or not Respondent Rivers subjectively believed this to be legally allowable, the collection of the money cannot be considered by mistake or inadvertence. The failure to account for the return of the money makes the violations ongoing. Respondent Rivers explanation for failing to maintain office hours was mentioned other than that the business was opened later in the day, and that he has various business difficulties as a one man operation (Testimony of Rivers; Exhibit 6). Without seeking to minimize these difficulties, it is within a broker's ability to file with the Department and post different hours of operation so that the Department will not waste two to three hours of investigator time in visiting an unstaffed business and the public will have reasonable notice of when the broker can be reached in the office. Nevertheless, I note that normally the failure to staff a mortgage loan broker location during regular office hours would not be, by itself, grounds for revocation or suspension of a broker license. The violation primarily effects the convenience and efficiency of the Staff in performing required compliance reviews. Nevertheless it is here coupled with a serious breach of duty to the

borrower violating numerous provisions of the Mortgage Loan Broker Act and other law.

6.) I find that the above referenced violations call into question whether Respondents maintain the requisite financial responsibility, experience, character, and general fitness to command the confidence of the community and to warrant the belief that the business may be operated honestly, fairly and efficiently, according to the purposes of the Mortgage Loan Broker Act, pursuant to *S. C. Code Ann. §40-58-60 (A)*.

7.) Since Tricounty is merely a fictitious name for a sole proprietorship wholly owned by Respondent Rivers, and in no way is a corporate entity apart from him, I regard Tricounty as an alter ego of Respondent Rivers and decline to assess fines against both as separate entities.

IT IS THEREFORE ORDERED that Respondents Tricounty and Rivers cease and desist operating their brokerage business in violation of the Mortgage Loan Broker Act, pursuant to *S.C. Code Ann. § 40-58-80 (A)*;

IT IS FURTHER ORDERED that Respondent Tricounty pay an administrative fine of five hundred dollars for these violations of the Mortgage Loan Broker Act pursuant to *S. C. Code Ann. § 40-58-80 (C)*;

IT IS FURTHER ORDERED that Respondent Tricounty's bond be increased to twenty five thousand (\$25,000.00) dollars. The reason for this increase is the serious breach of duty to a borrower remaining unresolved as of the date of this Order, and the appearance that other borrowers may be at risk if the bond is not increased. This is to be done within thirty days of the signing of this Order and the Staff in any case is Ordered not to renew a certification for Respondent Tricounty until this bond increase is accomplished;

IT IS FURTHER ORDERED that Respondent refund the Grants their money pursuant to Section 34-31-40(c). Concerning the additional one thousand (\$1000.00) dollars the Grants claim, which apparently went to a real estate broker, there is no clear indication in the record that this money went through the Respondents' hands. There is an allegation by Mr. Grant, albeit not clearly proven, that the Respondents were responsible for the loss of the earnest money. I do not believe the record is clear enough to hold Respondents responsible for more than seven thousand (\$7000.00) dollars. This additional claim may be addressed in the other legal actions. The Respondents are ORDERED to send seven thousand (\$7000.00) dollars in certified funds to the Department to be forwarded to Grants within ten (10) days of the date of this Order. In the event that the Department has not received payment of these funds within ten days,

IT IS FURTHER ORDERED that the mortgage loan broker license of Respondent Tricounty as well as Respondent Rivers' authority to work for Tricounty or any other mortgage loan broker must be revoked pursuant to *S. C. Code Ann.* § 40-58-80 (C) and (F), that Respondents take immediate steps to give the Department possession of the license itself, that the Staff commence a proceeding to access the Respondents' bond to pay for Respondents' liabilities as set forth in this Order, and such portions of this Order as require Respondents to increase the bond to twenty five thousand (\$25,000.00) dollars shall be deemed moot, except that this Order shall be deemed adequate evidence of the necessity of a twenty five thousand dollar bond should Respondent Rivers ever seek and be granted a mortgage loan broker license in the future.

AND IT IS SO ORDERED.

Philip S. Porter
Administrator

Columbia, S. C.
_____, 2002